



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Shoeder's Auto Center for a Permit
to Place a Boat Ramp and Service Pier on the Bed
of Shepard Lake, City of Rhinelander, Oneida
County, Wisconsin

Case No.: 3-NO-97-0007

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Shoeder's Auto Center, Hwy. 17 North, P. O. Box 1338, Rhinelander, Wisconsin, 54501, completed filing an application with the Department of Natural Resources for a permit for a boat ramp and service pier to a commercial marina operation located on the bed of Shepard Lake in the NW ¼ of the SE ¼ of Section 28, Township 37 North, Range 9 East, City of Rhinelander, Oneida County, Wisconsin. A Notice of Proposed Structure was not issued in regard to the above-captioned matter. The Department of Natural Resources issued a permit on July 8, 1997, to Shoeder's Auto Center for the boat ramp and service pier.

On August 4, 1997, the Department received a request for contested case hearing pursuant to sec. 227.42, Stats., from several interested parties.

On April 4, 2000, the Division of Hearings and Appeals received the Request for Hearing from the Department of Natural Resources.

Pursuant to due notice hearing was held on June 6, 2000, at Rhinelander, Wisconsin before Jeffrey D. Boldt, administrative law judge (the ALJ).

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Shoeder's Auto Center, by

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Mr. and Mrs. Marquardt, Mr. and Mrs. Dave Biser, Mr. and Mrs. Ken Johnson, Mr. and Mr. John Schutts, Mr. and Mrs. Brusso, Mr. and Mrs. Ron Zalesny, Ms. Terri Kallio, Theresa King, Mr. and Mrs. Lavern Schenzel, Mr. and Mrs. Kinney, Mr. William Rodd, Mike Guchenbert, by

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FINDINGS OF FACT

1. Shoeder's Auto Center, Highway 17 North, P. O. Box 1338, Rhineland, Wisconsin, 54501, completed filing an application with the Department of Natural Resources (the DNR) for a permit under sec. 30.12, Stats., to place a boat ramp on the bed of Shepard Lake, City of Rhineland, Oneida County. The DNR and the applicant have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicant owns real property located in the NW ¼ of the SE ¼ in Section 28, Township 37 North, Range 9 East, Oneida County. The above-described property abuts Shepard Lake which is navigable in fact at the project site. Shepard Lake is a small drainage lake consisting of approximately 179 surface acres. The shoreline in the area is heavily wooded.

3. The applicant has constructed a boat ramp on his large riparian parcel. The applicant owns approximately 34 acres, including nearly 1200 feet of riparian frontage. (Ex. 2) The Department issued a "short-form", over-the-counter permit to construct the boat ramp on July 8, 1997. The ramp consists of two pre-cast concrete pads, three feet wide and ten feet long. The ramp is constructed within permit limits. The lakebed in that area consists of a layer of organic "muck" over a sand bottom material. There is some dispute as to the depth of the organic material. DNR Regional Aquatic Habitat Coordinator Dale Lang (Lang) measured two to six inches of the mucky material. Other area residents estimated a muck layer as much as two feet in depth.

4. The ramp is used primarily for the purpose of gaining access to water in conjunction with a commercial marina operated by the applicant. The project also involves

placement of a small pier, 30 foot long, that is exempt from 30.12 permit requirements. (Lang) Shoeder's Auto and Marine Center is located approximately 500 feet from the lake. The marina will use the boat ramp to allow customers to test-drive new boats and recently repaired boats. The area between the Center and the lake is served by a fairly steep gravel road. Customers will be accompanied by a marina mechanic at all times. (Shoeder) The marina has used the boat ramp for the purposes described above since construction of the boat ramp in 1997. Mr. Shoeder testified that he has used the ramp at least ten times per summer over the past three years. He has launched only smaller fishing boats, 14 to 16 feet in length. The marina has a financial incentive to launch only boats that are appropriate for Shepard Lake. (Shoeder) If the marina launched overly large boats, they could be damaged.

5. The boat ramp does not materially obstruct existing navigation on Shepard Lake and will not be detrimental to the public interest upon compliance with the conditions of this permit. The boat ramp does not extend into areas typically navigated on Shepard Lake.

6. There is a healthy fishery in Shepard Lake, including northern and walleye pike, muskie and numerous pan fish including bluegill, croppie and perch. There is no dispute that bluegill spawn near the boat ramp project area.

DNR Fish Biologist Ronald Thies provided undisputed expert testimony that there would be no significant detrimental impacts to fishery values as a result of the placement and use of the boat ramp. There is nothing unique about the habitat near the project that makes it essential for maintenance of a healthy bluegill fishery. Further, the area of disturbance is relatively small in size. A preponderance of the evidence indicates that the project will not have a detrimental impact upon fishery values in Shepard Lake.

7. There will be no detrimental impacts to wildlife habitat as a result of the placement and operation of the boat ramp. DNR Wildlife Biologist Ronald Eckstein provided undisputed expert testimony that there would be no detrimental impact to wildlife as a result of the placement and use of the boat ramp.

8. Mr. Lang of the DNR testified that frequent unlimited use of the boat ramp could have a detrimental localized impact on water quality by stirring up the mucky sediment. Further, unlimited use of the boat ramp in conjunction with the marina, would increase boat noise and traffic, disturbing the quiet enjoyment of the area by both neighboring riparians and wildlife. (Ex. 21) Recognizing these concerns, the applicant has agreed to some restriction on the use of the boat ramp. The applicant has agreed to use the boat ramp for marina purposes no more than five times per day, and no more than 100 times per season. He has also agreed to only launch marina boats from 9:00 a.m. to 5:00 p.m. daily. Finally, he has agreed to not use the boat ramp for business purposes on Sundays.

All parties agreed that manual launching of boats, especially from the lakeward edge of the 30 foot boat launching pier, would significantly reduce detrimental impacts to water quality. (Zalesny, Lang, Shoeders) The pier has not yet been installed, due to uncertainty about the outcome of this proceeding. (Shoeders) If installed, the pier will extend to approximately a two-foot water depth. Launching boats at this depth will lessen the impact of sediments being stirred

from the mucky bottom. Under these circumstances, a permit condition requiring the launching of boats in this manner is reasonable and necessary.

The parties do not agree on the maximum number of boat launches per day. Mr. Shoeder would like to be able to launch five marina boats per day, many objectors do not want him to launch any. Mr. Zalesny, a long-time area resident with a degree in Natural Resources Management, urged no more than two launches per day. The DNR recommends a condition restricting the marina to launching no more than three commercial boats per day. Shoeder testified that the marina typically launched perhaps 200 to 300 boats per season. However, only one fourth of those launches would involve smaller boats appropriate for Shepard Lake. Shoeder testified that the marina would agree to launch no more than 100 boats total per season from the Shepard Lake boat ramp. Under these circumstances, three marina-related boat launches per day should be enough to meet the applicant's needs. The DNR position represents a reasonable balancing of the rights of the permittee, of the public and of neighboring riparians.

9. Based upon the record developed at hearing, it is necessary to amend the permit as issued to include modifying conditions which limit the use of the boat ramp. In addition to restrictions, on the frequency and hours of operation, the permit includes restrictions on the use of personal watercraft and a ban on fogging engines in Shepard Lake. The conditions are reasonable and necessary to reduce excessive use of the small lake for the purposes of test-driving and repairing boats in conjunction with operation of Shoeder's marina. The conditions are also necessary to reduce detrimental impacts on neighboring riparians.

10. The applicant is financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

11. The boat ramp will not reduce the effective flood flow capacity of Shepard Lake upon compliance with the conditions in the permit.

12. The boat ramp will not adversely affect water quality nor will it increase water pollution in the lake. The structure will not cause environmental pollution as defined in sec. 281.01(10), Stats., if the structure is built and maintained in accordance with this permit.

13. The DNR has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

The Department issued a summary boat ramp permit. Numerous persons objected to the placement of the boat ramp, and particularly to the use of the boat ramp in conjunction with the Shoeder's boat sales operation. Because the permit was properly issued according to then-existing DNR policies, the objectors have the burden of proof. The objectors have not carried their burden of demonstrating that the boat ramp will be detrimental to the public interest in Shepard Lake.

Frequent, unlimited use of the boat ramp could have a detrimental impact on the quiet enjoyment of neighboring riparians, as well as upon water quality and natural scenic beauty. (Lang) Recognizing these concerns, the applicant has agreed to some restrictions on the use of the boat ramp.

The objectors took the position that any commercial use of the boat ramp is too much. However, there is no legal basis for this distinction. The public trust began as a public effort to secure the basic right of the public to use waterways for transportation. Commerce was at the heart of the original conception of the public trust doctrine. While the public trust doctrine has grown to include wider concerns, there must still be a place for transportation and commerce in the balancing of uses and users of public waters. The public trust doctrine requires the balancing of interests, including the rights of those who buy boats as well as of those that sell them.

The restrictions on the hours, frequency, and manner of operation of the boat ramp are an effort to achieve a balance in this unique situation. The objectors have not demonstrated that there will be detrimental impacts to the public interest in Shepard Lake, so long as the permit holder complies with the conditions set forth below.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.
2. The applicant is a riparian owner within the meaning of sec. 30.12, Stats.
3. The proposed structure described in the Findings of Fact constitutes a boat ramp within the meaning of sec. 30.12(3)(a)3.
4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under sec. 30.12, Stats., for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.
2. The permittee shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the DNR for the purpose of investigating the construction, operation and maintenance of the project.

3. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
4. The permit-holder shall to the extent practicable manually launch boats from the launch pier to reduce the raising of sediment and impacts on neighboring riparians.
5. No more than three marina boats shall be launched per day.
6. Usage of the boat ramp for marina purposes shall be restricted as follows: Marina boats shall be launched between 9:00 a.m. and 5:00 p.m., no commercial marina boats shall be launched on Sundays.
7. The maximum number of boat launchings shall be restricted as follows: No more than 100 commercial boats shall be launched per season. Shoeder's marina shall keep a log of said boat launches and make it available to the public and the DNR upon a reasonable written request.
8. No boats shall be "fogged", nor driven with "fog" in the engine, on Shepard Lake.
9. No personal watercraft ("jet-skis") shall be tested on Shepard Lake by Shoeder's marina.
10. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on June 29, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.